

*"An Advocate for Fisheries, Habitat and Water Quality"*

November 30, 2009

William Guthrie, Project Manager  
US Army Corps of Engineers, Sacramento District  
1325 J Street, Room 1480  
Sacramento, CA 95814-2922

Subject: **Public Notice SPK-2009-01197**-Comments on Permit Application for the Two Gates Fish Protection Demonstration Project

Dear Mr. Guthrie:

We submit these comments on behalf of the California Water Impact Network (C-WIN) and the California Sportfishing Protection Alliance (CSPA) on the Permit Application for the Two Gates Fish Protection Demonstration Project (Two Gates). Our comments consist of the attached comments on the Draft Environmental Assessment for the above-referenced project.

We oppose issuance of any permits by the Army Corps of Engineers for the Two Gates Project based on the information provided in the attached document. We request that you hold a public hearing on this project prior to issuance of any permits.

Respectfully submitted,

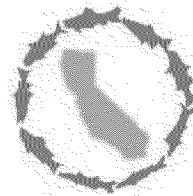
A handwritten signature in cursive script that reads "Carolee Krieger".

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A handwritten signature in cursive script that reads "Bill Jennings".

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Attachment: C-WIN/CSPA Letter to Mario Manzo, U.S. Bureau of Reclamation dated November 29, 2009



*"An Advocate for Fisheries, Habitat and Water Quality"*

November 29, 2009

Mario Manzo  
U.S. Bureau of Reclamation  
2800 Cottage Way, MP 730  
Sacramento, CA 95825

Subject: Comments on Draft Environmental Assessment for the Two Gates Fish Protection Demonstration Project

Dear Mr. Manzo:

We submit these comments on behalf of the California Water Impact Network (C-WIN) and the California Sportfishing Protection Alliance (CSPA) on the Draft Environmental Assessment (Draft EA) for the Two Gates Fish Protection Demonstration Project (Two Gates).

The Draft EA's Purpose and Need describes the Two Gates Project as a 5-year experiment *"designed to modify flows in the Sacramento-San Joaquin Delta (Delta) to reduce entrainment of smelt and other sensitive aquatic species in Central Valley Project (CVP) and State Water Project (SWP) export pumps"* through installation and operation of two operable barriers in the Central Delta on Old River and Connection Slough. The theory is that Delta smelt remain in areas of higher turbidity, and operation of the gates will allow isolation of turbid water and smelt from the export pumps.

However, the real purpose of the Two Gates Project is explained very clearly and quite differently in the Summary Statement submitted to the CalFed Science Review Panel:

*"...provide equal or improved protection to delta smelt (reduced entrainment at the export pumps) with higher than the minimum allowed water exports described in the Operations Criteria and Plan (OCAP) Biological Opinions (BOs) Reasonable and Prudent Alternatives (RPAs) of the U.S. Fish and Wildlife Service and National Marine Fisheries Service, while operating within the other water management requirement (D-1641)."*

The CalFed Science Review Panel summarized the project purpose quite well: *"In short, the Two Gates Project aims to increase export levels above current levels set by recent legal opinions (e.g. Wanger) and currently extant BOs."* Staff from the U.S. Bureau of Reclamation readily acknowledged that Two Gates is "a conveyance project" during the Stockton public meetings. They also admitted that no effort had been undertaken to ascertain whether there were alternate methods of evaluating the project's scientific

hypotheses, other than barriers. In other words, the project is essentially an export scheme masquerading as a scientific experiment.

Proposing a project of this magnitude under a Finding of No Significant Impact, given its stated purpose of keeping a listed species out of its identified Critical Habitat and given the massive hemorrhaging of the Delta's biological tapestry and its collapsing pelagic and salmonid fisheries and native lower tropic communities, is as unbelievable as it is outrageous.

We object to the proposed project under both the National Environmental Policy Act and the California Environmental Quality Act. There are significant undisclosed and unmitigated impacts from this project. A Draft Environmental Impact Statement/Environmental Impact Report (EIS/EIR) should be prepared with the California Department of Water Resources as the CEQA lead agency.

### **Summary of Comments**

The scientific basis of this project is unsubstantiated and lacks adequate peer review. The CalFed Science Program's Independent Review of the Two Gates Project identified numerous scientific weaknesses.

The use of a Categorical Exemption under the Governor's Emergency Drought Declaration by the San Luis Delta Mendota Water Authority is legally inadequate. A Categorical Exemption for this project does not meet the legal requirements of the California Environmental Quality Act (CEQA) or the definition of an emergency. There are significant impacts which require preparation of an Environmental Impact Report (EIR). The California Department of Water Resources should be acting as the CEQA lead agency, not the San Luis Delta Mendota Water Authority.

The Draft EA is grossly deficient because it acknowledges that increased predation is a likely impact of the project but provides no identifiable thresholds where action is to be initiated, no specific potential mitigation measures to be implemented and no criteria for adequacy.

The Draft EA is inadequate and cannot support the Finding of No Significant Impact. The proposed project will cause irreversible irreparable harm to the Delta, its fisheries and its people. An Environmental Impact Statement/Environmental Impact Report should be prepared.

There are numerous significant impacts, including, but not limited to the following:

- ☐ Loss of critical habitat for delta smelt, green sturgeon and Central Valley steelhead.

- ☐ Loss of habitat for longfin smelt, striped bass, Sacramento splittail, Sacramento tule perch, threadfin shad, American shad, river lamprey and other species.
- ☐ Increased entrainment of Sacramento tule perch, Central Valley steelhead, Mokelumne River, Calaveras River and San Joaquin River salmon, as well as Sacramento River Chinook that enter the Mokelumne River through either the Delta Cross Channel or Georgiana Slough.
- ☐ Loss of Essential Fish Habitat for severely depleted Central Valley fall and late fall Chinook salmon, both Species of Concern.
- ☐ Significant Impacts to recreational boating with increased carbon consumption for boats having to use alternate routes.
- ☐ Significant Impacts to rare plants in the project vicinity from construction activities.
- ☐ Significant Impacts to peak tidal flows and tidal water surface elevations.
- ☐ Significant impacts to water quality at Contra Costa Water District's Rock Slough diversion
- ☐ Potential significant impacts to the black rail, a State threatened species
- ☐ Potential significant impacts and deferred mitigation by failure to disclose mitigation measures, conditions and/or Reasonable and Prudent Alternatives required by the yet-to-be completed Biological Opinions by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service as well as other regulatory agencies such as the Army Corps of Engineers and the Central Valley Regional Water Quality Control Board.

The Draft EA fails to describe compliance under the California Endangered Species Act for the Proposed Project.

The Draft EA fails to fully analyze impacts to recreational boating. The project is essentially adjacent to Bethel Island and Discovery Bay and experiences some of the highest boating activity in the entire Delta. U.S. Bureau of Reclamation staff acknowledged during the Stockton public hearings that they had relied upon historical Delta-wide information regarding recreational boating use of Delta waterways and had not conducted any site-specific evaluations of specific boating traffic in the vicinity of the proposed project.

The Draft EA fails to fully analyze water quality impacts. This failure results from both a lack of full analysis of all water quality parameters, as well as a continued failure to disclose ongoing violations of Delta water quality requirements as a result of CVP and SWP pumping in the Delta. Given that DWR and Reclamation continue to flagrantly disregard the water quality requirements of D-1641, one can only assume that the 2 Gates Project will be used to increase Delta exports, despite assurances for a future environmental review prior to increased pumping. The Draft EA also fails to disclose increased Delta pumping and resultant water quality and upstream reservoir impacts that may result as a result of Proposed Project's "adaptive management" component.

The Cumulative Impacts section fails to disclose key actions pending to deal with poisonous drainage from the San Luis Unit of the CVP which may affect water quality, as well as serial abuse of the Governor's Emergency Drought Declaration to avoid proper documentation under CEQA. It also utterly fails to disclose the inherent conflict between the Two Gates Project and the San Joaquin River Restoration Program/Settlement Act.

The Draft EA fails to identify other alternatives such as gates on Georgiana Slough.

### **THE SCIENTIFIC BASIS OF THIS PROJECT IS UNSUBSTANTIATED AND LACKS ADEQUATE PEER REVIEW**

The Draft EA fails to describe the real culprit is the CVP and SWP delta pumps as one of the primary causes of decline of delta smelt and other species. The Draft EA admits on page 11, last paragraph that the correlation between delta smelt and turbidity occurs in "several years", which begs the question, which years is there NOT a correlation and how reliable is the basic hypothesis of the Proposed Action?

The Proposed Project lacks adequate peer review. The CalFed Science Program's Independent Review of the Two Gates Project<sup>1</sup> identified numerous weaknesses:

*"3.1 Project goals are not adequately defined"*

*"3.2 Poorly Formulated Smelt Behavior Model"*

*"3.3 The turbidity/behavior linkage is weakly statistical, not mechanistic"*

*"3.4 The hydrodynamic model needs better substantiation and quantification of uncertainty/reliability"*

*"3.5 Fish-turbidity studies are not clearly designed"*

*"3.6 Despite the potential "power" of an effective adaptive management framework to evaluate and refine the Two Gates Project toward its intended objectives, at present any actual plan is vague and undefined."*

The Draft Environmental Assessment fails to respond to the questions of scientific uncertainty posed by the CalFed Independent Science Review Panel (CalFed Science Panel). Furthermore, the Panel's recommendations have not been addressed:

#### **Summary of Recommendations:**

*"4.1 The project goals should be clarified and stated explicitly and prominently."*

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<sup>1</sup> [http://www.science.calwater.ca.gov/events/reviews/review\\_2gates.html](http://www.science.calwater.ca.gov/events/reviews/review_2gates.html)

*“4.2 Adaptive management - A rigorous adaptive management plan needs to be formulated that includes the decision process and specification of who is responsible to make decisions (refer to Section 3.6 above).”*

*“4.3 Commitment for monitoring, analysis and synthesis of results”*

*“4.4 Testing of mechanistic linkage is key and must be strengthened... 4.4a Need a more detailed plan for mechanistic sampling especially for fish... these should be at the level of sophistication/detail of an NSF proposal... 4.4b Construct several different behavior models and test them using an open/closed operations strategy on a week time scale – getting the physics accurate is relatively easy, but fish sampling (as described above) needs some thought... 4.4c Use a 3D model to confirm 2D hydrodynamic and particle tracking results...”*

*“4.5 Consequences to Other Species -The Panel feels that considerable uncertainty remains around potential unanticipated consequences of the Two Gates Project operation, as designed to maximize benefits to delta smelt, for other species of concern or interest.”*

*“4.6 Involve the CALFED Science Program in the project.”*

The investment of what appears to be millions of dollars (the document also fails to disclose costs and funding sources) based on extremely weak science is irresponsible and foolhardy. The proposed project has been sold by water users and their politicians as some kind of silver bullet, while it actually appears to be a red herring disguised as a scientific experiment in order to increase Delta exports at the federal and State Delta pumps.

The Draft Environmental Assessment utterly fails when it comes to science. While there may be benefits from the Proposed Project and additional monitoring stations, a good science experiment would install the additional monitoring stations BEFORE the Proposed Project is implemented in order to obtain baseline information for additional modeling. While trying to put a sugar coating on it, the CalFed Science Panel makes it abundantly clear that the scientific hypotheses and modeling are weak, at best. It's clear that the project is half baked and not ready for prime time.

Additionally, what guarantee is there that funding for monitoring will be available in the future once operations begin to increase Delta exports? Past experience with ongoing violation of water quality and other environmental commitments by Reclamation and DWR tells us that this project will not be utilized in the manner that is described in the Draft EA, and that any environmental commitments will be discarded once they are inconvenient or there is a perceived emergency.

## **CEQA DOCUMENTATION IS INADEQUATE**

**Incorrect CEQA Lead Agency/Misuse of Governor's Drought Declaration-** The California Department of Water Resources (DWR) should be the CEQA lead agency for this project. In an August, 2009 letter to the National Marine Fisheries Service, DWR Director Lester Snow stated "*...it is impossible to effectively address many of the federal operations in the Delta without involving participation and cooperation of the Department [of water resources] on behalf of the SWP.*"

- ☐ The project is a direct result of CVP and SWP pumping. The California Department of Water Resources operates the SWP. Two of the purposes of the project are provide entrainment protection to delta smelt and avoid additional impacts from CVP and SWP pumping on other listed species
- ☐ SLDMWA has 32 member agencies, only one of which is a SWP contractor, the other 31 are federal contractors
- ☐ The Court of Appeal in the Monterey Amendments litigation clearly stated that DWR is the "state agency charged with the statewide responsibility to build, maintain and operate" the SWP. The court further stated that it is "incongruous to assert that any of the regional contractors," could be the CEQA lead agency for such a project. The same concept applies to the Two Gates Project, as it is directly related to the DWR's pumping for the SWP in the southern Delta.
- ☐ The Governor's Drought Declaration is inappropriate for a CEQA Categorical Exemption. The effects of this project will go on for five years, likely longer than the drought declaration will remain in effect. The environmental effects of the project are also significant and approval cannot be justified without a full Environmental Impact Report. Furthermore, we do not believe that the Governor's Drought Declaration is justified for the reasons explained in the attached excerpts from the 4<sup>th</sup> Verified Petition of Mandate (Pages 14-18) in the lawsuit by Butte Environmental Council, C-WIN and CSPA against the Department of Water Resources regarding the Drought Water Bank. Further evidence of the lack of applicability for an emergency declaration is the federal government's recent refusal to a request by Governor Schwarzenegger to declare a federal emergency for portions of the San Joaquin Valley.

We understand that there will be a State EPA/Resources Agency Secretarial concurrence for use of the Governor's Drought Declaration to waive CEQA. How and why is the Governor's Emergency Declaration being used for an experiment? The Draft EA fails to address and justify how this project would qualify as an emergency. If the Proposed Project would lead to increased Delta pumping to abate the so-called "drought emergency", the Draft EA fails to clearly disclose the increased pumping, let alone its impacts to other resources such as Delta and upstream reservoir cold water storage, water quality, wildlife and fisheries.

## **PROJECT MODELING IS AN INADEQUATE BASIS FOR A FINDING OF NO SIGNIFICANT IMPACT**

The Delta estuary is an incredibly complex, poorly understood and highly degraded ecosystem, with numerous species in catastrophic decline. Previous environmental reviews of hydraulic modification projects have promised benign or beneficial results: yet all have exacerbated existing conditions.

Given the paucity of available empirical water quality data, evaluations of project impacts on water quality and flow are dependent upon flow and water quality modeling efforts. However, hydrodynamic modeling by any known technique is not an exact science. Models are easily manipulated and should not be employed as substitute for hard data or common sense. Subtle changes in coefficients or assumptions can dramatically alter output. Input variables are critical. Proper calibration and verification is crucial. Even then, models are only an idealization of actual field conditions and must be used with caution to ensure that underlying assumptions hold for the site-specific situation being modeled. Virtually all models, even those subject to peer-review, have significant rates-of-error.

Changes in the movement of water and the timing of water movement were evaluated using the one-dimensional Delta Simulation Model II (DSM2) and the RMA-Delta model (RMA). DSM2 has never been peer reviewed and has been heavily criticized. Its calibration and verification report has never been finalized and remains in an incomplete draft form. RMA is a proprietary model of the Metropolitan Water District (MWD) and has only been reviewed under contract with MWD. A review of RMA by Resource Management Associates, Inc., reported in an October 2008 Technical Memorandum, found a number of deficiencies, including a need for a resuspension term to account for speed and wind effects, the lack of adequate input data and the need for additional monitoring locations.

The 20 September 2009 CalFed Science Review of the Two Gates Project found numerous problems with the models, including a disparity between model predictions and observations related to flows and particle tracking, the need for a turbidity algorithm, and the need for 3D model confirmation of the 2D results. It pointed out that the turbidity model calibration was based upon *“only one water year,”* is *“not rigorous”* and the *“model results should be considered preliminary at best.”* It also pointed out that the turbidity/behavior linkage is weakly statistical and not mechanistic: i.e., *“the studies to date do not provide direct clear evidence for the detailed response by Delta smelt inferred in the behavioral model.”*

Considering the number of Delta species hovering on the abyss of extinction and the failure to evaluate impacts from impairing pollutants, proceeding under a Finding of No Significant Impact, for a project predicated upon seriously flawed models would be malevolent malpractice. This is especially true considering that the CalFed review



found that “*considerable uncertainty remains around potential unanticipated consequences*” and the fact that they found “*little rigor in any assessment of potential impacts on juvenile salmon*” or “*other species of concern or sensitivity.*”

Clearly, the Two Gates Project is not ready for prime time and requires a comprehensive EIS/EIR.

### **THE PROPOSED PROJECT AS DESCRIBED IN THE DRAFT EA WILL CREATE NUMEROUS SIGNIFICANT IMPACTS**

**Loss of critical habitat for delta smelt, green sturgeon and Central Valley steelhead-** The Draft EA admits that it will reduce critical habitat for Delta smelt, Central Valley steelhead and proposed critical habitat for green sturgeon. The Draft EA justifies a Finding of No Significant Impact based on unsubstantiated claims that “*overall the Proposed Action is designed to have beneficial effects on delta smelt*” (p 126), even though Table 3.4- identifies up to a 3% reduction in Delta smelt habitat. The Draft EA completely fails to quantify the critical habitat reduction and increased entrainment for Central Valley steelhead and green sturgeon, even though it admits (p 135) that for juvenile Chinook salmon and steelhead “*...while under other hydrologic conditions operations of the gates provides little benefit or even increase entrainment risk.*” The Draft EA also states that construction would “*place sturgeon at risk for injury or death*” (P 130) and that in relation to green sturgeon (P 131) “*Movement of adult fish from the south Delta to the Sacramento River would be impaired, but not prevented.*” Furthermore, the Draft EA (P 137) states that “*Proposed operations would provide potential opportunities for predators*” to green sturgeon. Clearly, any loss of individual fish or critical habitat for a listed species is a significant impact which requires an Environmental Impact Statement under NEPA and an Environmental Impact Report under CEQA.

**Loss of habitat for longfin smelt, striped bass, Sacramento splittail, threadfin shad, American shad, river lamprey and other species-** The Draft EA admits that it “*could potentially impede or delay the upstream migration of splittail*” (p 139). The Draft EA, without justification, states that the effects of the Proposed Action would be “*none to minor*” on river lamprey. It states, without analysis, that impacts to a variety of unlisted fish will be none to minor, but admits (p 19) that construction and operation of the gates will affect habitat and migration, but downplays, without substantiation or mitigation, that these changes are “*temporary.*” These are significant impacts requiring preparation of an EIS/EIR.

**Increased entrainment of Central Valley steelhead, Mokelumne River, Calaveras River and San Joaquin River salmon, as well as Sacramento River Chinook that enter the Mokelumne River through either the Delta Cross Channel or Georgiana Slough-** The Draft EA admits on (P 136) that “*Entrainment is likely to increase for fish emigrating the San Joaquin River and Mokelumne River because of the altered*

*hydrodynamics. This included Sacramento River fish that enter the Mokelumne River th[r]ough either the Delta Cross Channel or Georgiana Slough.”* The document further states (P 137) that “*Adult steelhead moving toward the San Joaquin River may be delayed or confused by the flow regime...*” It also states (P 137) that certain operations “*...would result in minor to moderate effects to San Joaquin River steelhead and minor to no effects to Mokelumne River steelhead.*” These are all significant impacts requiring preparation of an EIS/EIR. The Draft EA fails to disclose the inherent conflict with the San Joaquin River Restoration Program, even though it admits negative impacts to San Joaquin River salmon and steelhead. Clearly the Two Gates Project will nullify in part, the millions of dollars and substantial dedication of water for restoration of San Joaquin River salmonids.

**Loss of Essential Fish Habitat for severely depleted Central Valley fall and late fall Chinook salmon, both Species of Concern-** The Draft EA states that it will result in a loss of Essential Fish Habitat for these species, but downplays it as “minor” without any quantification (P 134) or substantiation. These are significant impacts requiring preparation of an EIS/EIR, especially given the severe economic consequences of the recent fishing ban on Central Valley Fall Chinook.

**Significant Impacts to recreational boating with increased carbon consumption for boats having to use alternate routes-** The impact to recreational boaters from construction and operation of the gates is a hugely contentious issue, as evidenced by the hundreds of boaters who angrily attended the recent hearings on the Two Gates Project. The Draft EA asserts that there will be no significant impacts to boating from the Proposed Project, yet there is no site-specific boating survey included in the project analysis to determine what level of boating occurs there. Discovery Bay, Rio Vista and Bethel Island are within close vicinity to the Proposed Project and the area on Middle River is the largest concentration of boating in the Delta.

During construction, boaters would have to take alternate routes, thereby increasing carbon consumption, which is not analyzed. During project operations after construction, it's clear that boaters will be significantly delayed by either waiting for the gates to open, or by having to trailer their boats around the gates with planned boat ramps. However, the Draft EA fails to identify the number of boats that would be affected, the size of those boats, and the amount of additional carbon emissions from the boats which will take alternate routes. These are significant impacts requiring preparation of an EIS/EIR.

**Significant Impacts to rare plants in the project vicinity from construction activities-** The Draft EA states (P 171) that three special status plant species (brown fox sedge, wooly rose-mallow, and Suisun Marsh aster) occur in the study area and may be impacted by construction activities. Deferred mitigation occurs because all plant surveys have not been completed, let alone completion and disclosure of “a

*mitigation plan, approved by DFG...*” These are significant impacts requiring preparation of an EIS/EIR.

**Significant Impacts to peak tidal flows and tidal water surface elevations-** The Draft EA states clearly that hydrodynamics of the Delta will change in terms of both peak tidal flows and tidal water surface elevations (Section 3.9). Tidal flows during some periods at specific locations will change up to 76%, involving thousands of cubic feet per second (Tables 3.9-3 and 3.9-4) with changes in lower bounds up to 143% at Mossdale (Table 3.9-5). Changes in mean high water surface elevations range from 2 to 13 inches. These are not small numbers in a complex estuary vital to the survival of many species. The Draft EA erroneously concludes that these changes are not significant. The Draft EA also fails to explain why 2004 is year for the Existing Conditions comparison. If this were a CEQA document, Existing Conditions would be the conditions at the time of issuance of the Notice of Preparation. These are significant impacts requiring preparation of an EIS/EIR.

**Significant impacts to water quality at Contra Costa Water District’s Rock Slough diversion-** The Draft EA states (P 245) that *“During the periods of operation, gate closure would slightly reduce local flushing, which could lead to a slight degradation of water quality at Rock Slough. This would only be a significant concern if Contra Costa Water District (CCWD) operations required significant flow from Rock Slough.”* The Draft EA fails to define any mitigation measures to ensure no significant impacts to CCWD’s Rock Slough intake. Therefore, this is a significant impact requiring preparation of an EIS/EIR.

**Potential significant impacts to the California black rail, a State threatened species-** The Draft EA admits that changes in tidal water surface elevations could *“alter nesting behavior”* of the black rail (P 167), and that the reduction in the elevation of mean high water *“could reduce the depth of water in nesting habitat to below the narrow range of tolerance for this species and thus could reduce the area of suitable nesting habitat known from this area.”* The Draft EA then erroneously concludes that there will be no significant impact because of changes in water surface elevations are within the range of changes from storms and daily tidal exchanges. The Draft EA further states that methyl mercury production may increase because of increased exposure of marshes to wetting and drying cycles, but again concludes without support, studies or mitigation that there is no impact because of the short duration and change from existing conditions and therefore no mitigation is proposed, other than a future monitoring plan which is deferred mitigation. These are all significant impacts requiring preparation of an EIS/EIR.

**Potential significant impacts and deferred mitigation by failure to disclose mitigation measures, conditions and/or Reasonable and Prudent Alternatives required by the yet-to-be completed Biological Opinions by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service as well as other**

**regulatory agencies such as the Army Corps of Engineers and the Central Valley Regional Water Quality Control Board-** The project cannot be approved under CEQA or NEPA because the Biological Opinions from the US Fish and Wildlife Service, National Marine Fisheries Service and the California Department of Fish and Game have not yet been released. If the Biological Opinions contain new mitigation measures/Reasonable and Prudent Alternatives, they should be subject to full disclosure, public review and public comment through issuance of a Draft Environmental Impact Statement and Report. Both Reclamation and the San Luis Delta Mendota Water Authority should be well aware of this requirement for public review of mitigation measures contained in Biological Opinions, as it was a key issue in the Trinity River litigation before Judge Oliver Wanger in 2000 through 2004 that both entities were involved in. Additional conditions may also be placed by the Army Corps of Engineers for its Clean Water Act 404 permit and the Central Valley Regional Water Quality Control Board for its Clean Water Act 401 certification. These are significant impacts and a failure to disclose mitigation measures requiring preparation of an EIS/EIR.

### **Water Quality Analysis is Flawed**

The Draft Environmental Assessment does not address changes to agricultural water quality or other Delta water quality standards, but merely asserts that there will be no changes. The analysis is flawed in that it fails to disclose the existing condition that the CVP and SWP pumps are continually violating Delta water quality standards under existing conditions/No Action as follows:

- March 2009: Delta outflow requirements violated.
- June 2009: San Joaquin River flow requirements violated.
- From mid-December 2008 to September 2009, South Delta salinity standards were violated.
- Water transfers are occurring using "Joint Point of Diversion" (JPOD) despite D-1641 prohibiting its use when salinity standards in the south Delta, above, are violated, imperiling Delta fish populations and Delta farming operations

These are routine events in the wake of the adoption of D-1641 in 2000. A State Water Resources Control Board 2006 Cease and Desist Order requiring the projects to comply with D-1641 salinity requirements in south Delta river channels has not been complied with nor enforced by the State. Failure to disclose these ongoing water quality violations skews the analysis in favor of the Proposed Project because the Draft EA assumes meeting existing water quality requirements, when in fact; they are not being met even without the Proposed Project and the additional pumping it contemplates.

The analysis of likely water quality impacts in the Draft EA is not only woefully inadequate; it is essentially nonexistent. The Proposed Project must be consistent with and comply with requirements of the federal Water Pollution Control Act and California's Porter-Cologne Water Quality Control Act. Delta water quality must not be sacrificed at the altar of increased exports. The historical export of South Delta water has

fundamentally altered the movement of pollutants throughout the Delta. Rapid population growth and changing agricultural chemical usage in and upstream of the Delta has significantly increased the mass loading of numerous pollutants. Implementation of the project will further alter the distribution and concentration of these constituents. The majority of water quality monitoring has primarily focused on salinity, with little emphasis on other water quality parameters. The Draft EA only discusses turbidity, chlorophyll and salt. Sufficient baseline field data does not yet exist to adequately calibrate/verify models and evaluate project effects on the rainbow of water quality constituents (i.e., virtually the entire suite of organic and inorganic pollutants) that will likely be affected by the project. A rigorous water quality analysis should precede project evaluation, alternative formulation, and implementation in an EIS/EIR.

Delta waterways are identified on the 2006 California Clean Water Act 303(d) List as impaired because of diazinon, chlorpyrifos, DDT, Group A Pesticides, electrical conductivity, mercury, PCBs, dioxin, furan compounds, exotic species, organic enrichment/low dissolved oxygen and unknown toxicity. Changes in hydrology affects the fate and transport of pollutants. Synthetic and natural contaminants have bioaccumulated in Delta fish and other aquatic organisms in quantities exceeding acceptable standards for food consumption. Inexplicably, the Draft EA fails to address the project's effects on the full suite of pollutants presently identified as impairing Delta waters, with the exception of salt. The Draft EA cannot simply evaluate project impacts in terms of a "conservative" constituent like salt. It must analyze and quantify the Project's effects on toxicity and impairing constituents in the south Delta and propose mitigation, so that the public and decision makers may reach their own conclusions about the adverse impacts of the project. *Save Our Peninsula v. County of Monterey* (2001) 87 Cal. App. 4th 99, 130. See *Citizens to Preserve the Ojai v. County of Ventura* (1986) 176 Cal. App. 3d 421, 432-33 (finding "an absolute failure to comply [with CEQA]" where information relevant to project's impacts was omitted).

Toxicity to lower tropic populations in Paradise Cut, attributable to organophosphorus and pyrethroid insecticides, extends for weeks at a time. Delta waters frequently contain a cocktail of as many as 15 pesticides. Many of these interact additively or synergistically and/or bind to sediment. The tissue of fish collected from the South Delta contains high concentrations of bioaccumulative toxins (i.e., legacy pesticides, mercury and PCBs). Changes in south Delta hydrology will inevitably affect the fate and transport of these toxic constituents. An EIS/EIR must be prepared to include a characterization and assessment of the sources, mass loading and fate and transport of all pollutants likely to be present in south Delta channels and an evaluation of water quality impacts from the project and alternatives.

The San Joaquin River is a historical source of selenium and mercury loading to the southern and central Delta. Aquatic organisms bioaccumulate mercury and selenium. The proposed project will likely result in increased residence time which, in turn, will increase bioaccumulation of selenium and mercury in aquatic organisms. An EIS/EIR

must be prepared to fully evaluate the effects of redirected selenium loads into the eutrophic areas of the south and central Delta.

Discussion with staff from the California Department of Public Health and the Central Valley Regional Water Quality Control Board, as well as private consultants, lead us to believe that elevated concentrations of dioxins are likely present in the southern Delta. An EIS/EIR should be prepared to evaluate the project's effects on likely dioxin concentrations in the South Delta.

Elevated levels of pathogens have been identified in eastern, southern, and western Delta channels. Changes in flow will likely have an effect on concentration and spatial distribution of bacteria, viruses and parasites. Consequently, an EIS/EIR must be prepared to identify and evaluate the project's effects on pathogens.

The project's permanent barriers and inevitable changes in hydrology and export rates will likely have a significant effect on existing efforts to achieve water quality standards. An EIS/EIR must be prepared to discuss the project's compatibility with TMDLs, Toxic Hot Spot Cleanup Plans, NPDES permitting for increased contaminant loading and Basin Water Quality Control Plans. It must also discuss how altered hydrology and increased exports will affect implementation of control measures.

Increased exports may alter streamflow and water quality regimes on major tributaries to the Delta (including the Trinity and Klamath Rivers). An EIS/EIR must be prepared to more completely evaluate and discuss the project's effects on the physical and chemical parameters necessary to support renewable fisheries within upstream tributaries and reservoirs.

Toxic blue-green algae has become a problem in the Delta in recent years. The Proposed Project will alter residence time of nutrients and may encourage blue-green algae growth, yet there is no evaluation, discussion or proposed mitigation measures addressing this issue.

A significant component of the project involves increased dredging of Delta channels. Recently, the Central Valley Regional Water Quality Control Board strengthened requirements for dredging and dredge spoil placement. A comprehensive assessment of contaminant remobilization from dredging activities and potential effects of land disposal on terrestrial organisms is required. The discussion must include an evaluation of the adequacy of available sediment analyses (i.e., number of core samples, locations, constituents analyzed, concentrations, detection limits, etc.) and identify and evaluate disposal sites.

Furthermore, the Draft EA states that there may be additional water supply benefits (Page 6), but then fails to identify or analyze what those benefits would be and what the

impacts might be from increased Delta pumping at the CVP and SWP facilities. The CALFED summary document states as follows:

*“The proposed 2-Gates Fish Protection Demonstration Project (2-Gates Project) seeks to provide equal or improved protection to delta smelt (reduced entrainment at the export pumps) with higher than the minimum allowed water exports described in the Operations Criteria and Plan (OCAP) Biological Opinions (BOs) Reasonable and Prudent Alternatives (RPAs) of the U.S. Fish and Wildlife Service and National Marine Fisheries Service, while operating within the other water management requirement (D-1641).”*

What are the additional exports and under what circumstances would they occur? What are the impacts of such additional exports in the Delta, upstream reservoirs/fisheries, and to water quality in the San Joaquin and Tulare basins from production of increased drainage from seleniferous soils? The document fails to disclose any of this information and attempts to portray the Proposed Project as merely a scientific experiment when it is clearly viewed as a way to obtain increased water supplies by CVP and SWP contractors who rely on Delta pumping.

Furthermore, the Draft EA relies on meeting the Reasonable and Prudent Alternatives (RPA's) of the CVP/SWP Operating Criteria and Plan Biological Opinions (BO's) by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service. However, the RPA's of the BO's are designed only to avoid extinction, but not eliminate all significant adverse impacts. An EIS/EIR must be prepared which discloses all significant impacts, not just compliance with the RPA's.

Furthermore, there is a potential that the BO's may not remain in effect. There are continued Congressional efforts to exempt Reclamation's Delta operations from the federal Endangered Species Act. Furthermore, Judge Wanger is revisiting the BO's and may weaken the RPA's because of an alleged lack of NEPA compliance. Therefore, the Proposed Project should be evaluated in an EIS/EIR without the BO's as a reasonably foreseeable operation.

**Economics-** The Draft EA completely fails to indicate the cost of the Proposed Action, who will pay, what are the annual maintenance costs? As discussed elsewhere and in the concerns expressed by the CalFed Independent Science Review Board, the project *“Must commit funding for monitoring, analysis and synthesis of results...”* If the Proposed Project will lead to increased Delta pumping, there should be a full analysis of the costs and benefits of the action to determine whether it is worth the money.

**Cumulative Impacts-** This section fails to mention CEQA for the Delta Mendota Canal/California Aqueduct Intertie and the continued abuse of the Governor's Drought Declaration to allow CEQA exemptions for projects that goes far beyond the current drought. The Draft EA also fails to mention San Luis Drainage Record of Decision and

the pending Grasslands Bypass Project 2010-2019 Record of Decision. Both projects affect water quality such as turbidity, salinity, boron, and selenium toxicity to Chinook reintroduction as contemplated by the San Joaquin River Restoration Program/Settlement Act. The cumulative impact of ongoing selenium discharges to the San Joaquin River and its impacts to San Joaquin River juvenile salmon and steelhead populations clearly conflict with the San Joaquin River Restoration Program/Settlement Act. The Final EIS/EIR for the Grasslands Bypass Project 2010-2019 underestimates selenium toxicity to juvenile salmonids by underestimating salmonid residence in selenium-contaminated portions of the San Joaquin River. Why then should the public continue to put money and water into San Joaquin River salmon restoration when they will be poisoned by selenium and killed at the Delta pumps?

**Alternatives-** The Draft EA fails to consider any other alternatives, such as the suggestion by the CalFed Science Panel to install less intrusive gates on Georgiana Slough. It's clear that a reasonable range of alternatives water not considered because the decision to approve the Two Gates Project has already been made by political influences on the Bureau of Reclamation.

## **CONCLUSION**

The Draft Environmental Assessment is inadequate to justify a Finding of No Significant Impact for the Two Gates Project. The Proposed Project is misrepresented as a science experiment when, in fact, it is a water supply project. There are significant adverse environmental impacts from the Proposed Project. The science and modeling behind the project is weak, unsubstantiated or just plain nonexistent. The proposed CEQA Notice of Exemption to be filed under the Governor's Emergency Drought Declaration by the San Luis Delta Mendota Water Authority is illegal both in terms of the exemption, and the lead agency. An Environmental Impact Statement/Environmental Impact Report must be prepared with the California Department of Water Resources as the CEQA lead agency.

We look forward to your responses.

Respectfully submitted,



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Mr. Mario Manzo, Bureau of Reclamation; C-WIN/CSPA comments on Draft Environmental Assessment for Two Gates Fish Protection Demonstration Project  
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Attachments: Pages 14-18 from 4<sup>th</sup> Verified Petition for Mandate, BEC vs. DWR, dated April 13, 2009

cc: Ken Salazar Interior Secretary  
David Hayes, Deputy Interior Secretary  
Don Glaser, Regional Director BOR  
Dan Nelson, San Luis Delta-Mendota Water Authority  
Alexis Strauss, USEPA  
Charles Hoppin, Chairman SWRCB  
Karl Longley, Chairman CVRWQCB  
Rod McGinnis, NMFS  
Ren Lohofener, USFWS  
John McCamman, Acting Director, Department of Fish and Game  
Lester Snow, Department of Water Resources

**FIRST CAUSE OF ACTION**  
**(Mandamus Against Respondents DWR, Resources, and**  
**the Governor for Violations of CEQA)**

49. Petitioners hereby reallege and incorporate by reference into this First Cause of Action all of the preceding and succeeding paragraphs of this Petition as though fully set forth herein.

50. Petitioners allege this First Cause of Action against DWR and Resources. Without conceding that the Governor approved the DWB, which Petitioners contest, in the event that any party contends that the Governor approved the DWB, Petitioners also allege this First Cause of Action against the Governor.

51. Respondents are subject to CEQA because they are state agencies, and state agencies must comply with CEQA prior to approving a public project. CEQA applies to the DWB Project as a public project. In approving the DWB Project, Respondents had discretionary authority over the Project. Consequently, prior to approving the DWB Project, Respondents were required to comply with CEQA.

52. CEQA imposes a three-tiered structure of environmental review of public projects. If a project does not fall within a statutory exemption, then CEQA requires preparation of either an Environmental Impact Report or a Negative Declaration (depending on the potential significance of environmental impacts). If a project falls within a statutory exemption, the preparation of an Environmental Impact Report or a Negative Declaration is not required.

53. Respondents determined that the DWB Project was statutorily exempt from further CEQA review, relying on the "emergency" exemptions provided in Public Resources Code section 21080, subdivision (b), paragraphs (3) and (4), and section 21172, and CEQA Guidelines section 15269, subdivisions (a), (b), and (c). This determination was erroneous because those exemptions are inapplicable to the DWB Project for the reasons noted below. Respondents therefore prejudicially abused their discretion by failing to proceed in the manner required by law and by failing to support their conclusions with substantial evidence in the record.

54. An agency's use of an emergency exemption must meet "close judicial scrutiny of each element of the Legislature's detailed definition of 'emergency.'" (*Western Mun. Water Dist. v. Superior Court* (1986) 187 Cal.App.3d 1104, 1113; quoted also in *Calbeach Advocates v. City of*

1 *Solano Beach* (2002) 103 Cal.App.4th 529, 536.)

2 **Count 1**  
3 **(The DWB Project Is Not Exempt from CEQA Under Section 21080(b)(4).)**

4 55. CEQA section 21080(b)(4) exempts from CEQA review “[s]pecific actions necessary to  
5 prevent or mitigate an emergency.” The related CEQA Guidelines section 15269(c) provides:  
6 “Specific actions necessary to prevent or mitigate an emergency” are emergency projects and  
7 “exempt from the requirements of CEQA.” Guidelines section 15269(c) excludes from the  
8 exemption “long-term projects undertaken for the purpose of preventing or mitigating a situation that  
9 has a low probability of occurrence in the short-term.”

10 56. Under CEQA, an “emergency” is defined as: “a sudden, unexpected occurrence, involving  
11 a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage  
12 to, life, health, property, or essential public services. ‘Emergency’ includes such occurrences as fire,  
13 flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident,  
14 or sabotage.” (Pub. Resources Code, § 21060.3; 14 Cal. Code Regs., § 15360.)

15 57. Respondents’ use of section 21080(b)(4) to avoid CEQA review of the DWB Project is a  
16 prejudicial abuse of discretion because this Project does not meet the statutory requirements for  
17 invoking this exemption.

18 58. Neither the “judicially mandated operational curtailments” or “drought” constitute a “sudden,  
19 unexpected occurrence” because the events leading to the current water conditions in California have  
20 been gradual. Indeed, the Governor’s Proclamation recognizes that “the drought conditions ... have  
21 become worse in this third year of drought, creating emergency conditions ....” (Exhibit 1, p. 1  
22 [emphasis added].) Further, a drought is not similar to the examples of natural disasters listed in  
23 CEQA’s definition of “emergency,” i.e., “fire, flood, earthquake, or other soil or geologic  
24 movements,” which are all sudden, one-time events. Neither the Governor’s Proclamation nor the  
25 Final Addendum refers to any sudden change in the severity of the drought over the last three years.  
26 On the contrary, a DWR publication entitled “Recent California Drought” explains that “unlike  
27 earthquakes, fires, or floods, drought onset is slow, allowing time for water suppliers to implement  
28 preparedness and response actions to mitigate reductions in normal supplies.”

1 59. Neither the “judicially mandated operational curtailments” or “drought” involve “a clear and  
2 imminent danger, demanding immediate action.” The water conditions in California – both at the  
3 time of the Governor’s Proclamation and at the time Respondents signed the Notice of Exemption  
4 – do not present a “clear and imminent danger” demanding “immediate” action absent environmental  
5 review. (See *Western Mun. Water Dist. v. Superior Court*, *supra*, 187 Cal.App.3d at 1111 [project  
6 to drill and release groundwater under city to reduce the risk of liquefaction during an earthquake did  
7 not satisfy the imminence requirement of section 21060.3: “The theory behind [emergency]  
8 exemptions is that if a project arises for which the lead agency simply cannot complete the requisite  
9 paperwork within the time constraints of CEQA, then pursuing the project without complying with  
10 the EIR requirement is justifiable. For example, if a dam is ready to burst or a fire is raging out of  
11 control and human life is threatened as a result of delaying a project decision, application of the  
12 emergency exemption would be proper.”].) While the 2009 water year may be a “dry” or “low  
13 water” year compared with historical averages, that classification does not rise to the level of an  
14 “emergency” for purposes of avoiding environmental review under CEQA. In *Western Mun. Water  
15 Dist. v. Superior Court*, *supra*, the court explains the standard for “imminence” as follows:

16 Although [the agency] urges that “CEQA, including its environmental impact report  
17 requirements, shall not apply to specific actions necessary to prevent or mitigate  
18 earthquakes or other soil or geological movements,” this interpretation is unsupported  
19 by the text of the exemption. Such a construction completely ignores the limiting  
20 ideas of “sudden,” “unexpected,” “clear,” “imminent” and “demanding immediate  
21 action” expressly included by the Legislature and would be in derogation of the canon  
22 that a construction should give meaning to each word of the statute. [Citation.]  
23 Moreover, in the name of “emergency” it would create a hole in CEQA of fathomless  
24 depth and spectacular breadth. Indeed, it is difficult to imagine a large-scale public  
25 works project, such as an extensive deforestation project or a new freeway, which  
26 could not qualify for emergency exemption from an EIR on the grounds that it might  
27 ultimately mitigate the harms attendant on a major natural disaster. The result could  
28 hardly be intended by the careful drafting of the Legislature, and is unmistakably  
opposed to the policy of construing CEQA to afford the maximum possible protection  
of the environment. [Citation.]

24 (187 Cal.App.3d at 1111-1112.) Likewise here, if Respondents were to apply emergency exemptions  
25 to all water projects in “dry” years in California, the agencies would conduct environmental review  
26 on only a fraction of their projects. Such a sweeping interpretation of CEQA would be contrary to  
27 the purpose of CEQA and would subvert the rationale for CEQA’s “emergency” exemptions.

28 60. Therefore, Respondents prejudicially abused their discretion in finding the Project exempt

1 under CEQA section 21080(b)(4) by failing to proceed in the manner required by law and by failing  
2 to support the decision with substantial evidence.

3 **Count 2**  
4 **(The DWB Project Is Not Exempt from CEQA Under Sections 21080(b)(3) or 21172.)**

5 61. CEQA section 21080(b)(3) exempts from CEQA review “[p]rojects undertaken, carried out,  
6 or approved by a public agency to maintain, repair, restore, demolish, or replace property or facilities  
7 damaged or destroyed as a result of a disaster in a disaster-stricken area in which a state of emergency  
8 has been proclaimed by the Governor pursuant to Chapter 7 (commencing with Section 8550) of  
9 Division 1 of Title 2 of the Government Code.” (See also Pub. Resources Code, § 21172; 14 Cal.  
Code Regs., § 15269(a).)

10 62. Respondents’ use of section 21080(b)(3) to avoid CEQA review of the DWB Project is a  
11 prejudicial abuse of discretion because this Project does not meet the statutory requirements for  
12 invoking this exemption.

13 63. The DWB Project does not “maintain, repair, restore, demolish, or replace” property or  
14 facilities affected by the proclaimed drought. As stated above, DWR defines the DWB Project as  
15 “the mechanism for acquiring and transferring water to replace [SWP and CVP] supplies lost and that  
16 will be lost due to the judicially mandated operational curtailments, aggravated by the conditions of  
17 drought.” (Final Addendum, p. 3 [emphasis added].)

18 64. To the extent the DWB Project purports to “replace” water supplies “lost” as a result of  
19 “judicially mandated operational curtailments,” such water supplies:

- 20 (1) are not “damaged or destroyed” because they are merely transferred to other uses;  
21 (2) are not lost “as a result of a disaster” because “judicially mandated operational  
22 curtailments” are not a “disaster” as proclaimed by the Governor; and  
23 (3) are not “property” because Real Parties who are potential buyers of DWB water  
24 transfers have no property rights in water delivered by the DWR or Bureau of Reclamation.

25 65. To the extent the DWB Project purports to “replace” water supplies “lost” as a result of  
26 “drought,” such water supplies:

- 27 (1) are not “damaged or destroyed” because they are merely transferred to other uses;  
28

1 (2) are not lost “as a result of a disaster” because the “conditions of drought” are not a  
2 “disaster” as proclaimed by the Governor; and

3 (3) are not “property” because Real Parties who are potential buyers of DWB water  
4 transfers have no property rights in water delivered by the DWR or Bureau of Reclamation

5 66. The Governor’s Proclamation speaks of “emergency conditions” and below-average  
6 precipitation and water storage, but not of a “disaster.” The Proclamation calls for measures to  
7 prepare for or avert a disaster if drought conditions continue. DWR’s “2009 Drought Water Bank  
8 Overview” document also speaks of “the potential [for 2009] to be one of the most severe drought  
9 years” and DWR’s work on “implementing a number of actions now in preparation for a potentially  
10 dry 2009 and beyond.” This language reflects a developing and ongoing crisis – not a disaster.  
11 Indeed, “state of emergency” is defined in the Government Code as “conditions of disaster or of  
12 extreme peril to the safety of persons and property.” (Gov. Code, § 8558(b).) Here, the Proclamation  
13 specifically uses the “extreme peril” language, but does not once include the term “disaster.” Since  
14 the section 21080(b)(3) exemption is only appropriate to respond to the effects of disasters,  
15 Respondents’ reliance on the exemption here is an abuse of discretion.

16 67. Economic hardship is not a “disaster” for purposes of CEQA section 21080(b)(3). (See  
17 *Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257, 1267-1268.) In  
18 describing the “emergency conditions” justifying a declaration of a state of emergency, the  
19 Governor’s Proclamation focuses heavily on the economic hardship caused by the drought in terms  
20 of lost agricultural revenues and lost jobs. (See Exhibit 1.) Respondents applied the “emergency”  
21 exemption to the DWB Project pursuant to the Governor’s Proclamation; thus, the exemption is based  
22 primarily on the adverse economic effects of the drought, which is not appropriate for a section  
23 21080(b)(3) exemption.

24 68. Therefore, Respondents prejudicially abused their discretion in finding the Project exempt  
25 under CEQA sections 21080(b)(3) and 21172 by failing to proceed in the manner required by law and  
26 by failing to support the decision with substantial evidence.

27 //  
28 //